84-1528

No. ____

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

G. HUGH WAMBLE, *et al.*,
Cross-Appellants-Appellees,

v.

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellees.

and

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Cross-Appellants-Appellees,

v.

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

CROSS-APPELLANTS-APPELLEES' JURISDICTIONAL STATEMENT ON CROSS-APPEAL

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QUESTIONS PRESENTED

1. Is the Title I bypass program, as administered by Blue Hills Homes Corporation in Missouri under agreement with the United States Department of Education, unconstitutional because it has a primary effect that either advances or inhibits religion contrary to the First and Fifth Amendments to the United States Constitution?

2. Does the administration of a federally-funded remedial educational program, which provides its services through an independent contractor, violate the Religion Clauses of the First Amendment when such services are provided on the premises of and at locations physically and educationally identified with the parochial institutions?

3. Relative to the findings of fact made by the district court, should the cross-appellants have been granted declaratory and immediate injunctive relief?

4. Does the Missouri Title I bypass program administered on the premises of parochial institutions violate the First and Fifth Amendment rights of cross-appellants by giving unequal treatment in favor of nonpublic school students?

5. Are the First and Fifth Amendment rights of Title I eligible students and their parents violated because the Missouri Title I bypass program has the effect of denying Title I bypass benefits unless a child is enrolled in and agrees to submit to the religious practices and policies of a church school which has entered into an agreement with an agent of the government for the providing of such public benefit?

6. Did the lower court err in finding that cross-appellants' challenge to the original contract award to provide

instructional services on the premises of church schools was rendered moot where BHHC, the contract recipient, was held to be a "puppet of the church" and its change to an "ostensibly neutral character" involved no acknowledgment of wrong doing, and there is a continuation of the basic management team structure, including the present founder who was a Roman Catholic priest?

7. Are cross-appellants entitled to declaratory and injunctive relief to assure that any independent contractor providing instructional services pursuant to a federally-funded program be and appear to be free from sectarian influence, sponsorship, support and involvement?

PARTIES TO THE PROCEEDING

G. Hugh Wamble was the original plaintiff in the district court. In addition to the Secretary of Education, several former subordinate federal officials were also named in the lower court. Additional defendants named were the Blue Hills Homes Corporation and John P. Cole, executive director of the Blue Hills Homes Corporation. Verline Cobbins, Alma V. Burt, Helen M. Hardiman, Odessa Hill, Mae Bell Washington, Dorothy H. McDonald, Bernether Macklin, Frank Calcote, Russel M. Bradly, Walter A. Reed, Robert G. Parsons, Jr., Roy A. Dickie, William C. Heck, Jr., Clarence E. Shockly, Clinton Smith, Mack E. McCorkle, John A. Souris, Clyde Morton, Lee Shearer, Paule H. Linhardt, August Trost, Roy E. Willey, Forrest F. McBaine, Carl C. Desmond, Lyle Kenneth Vale, W. Carter Durbin, Jack C. Collister, Eldon J. Cusic, Jack Furlong, Dennis Hammontree, Thomas C. Hurt, Paul K. Kawakami, Jim S. Noel, Stanley A. Pearson, Duane C. Purdy, Larry McCrory, Joseph E. Sheets, Jr., Joseph E. Stewart, and Marcus W. Doughty intervened as plaintiffs in the district court.

Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien were intervenor-defendants in the district court.

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On Appeal From The United States District Court For The Western District Of Missouri

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CROSS-APPELLANTS-APPELLEES' JURISDICTIONAL STATEMENT ON CROSS-APPEAL

Cross-Appellants-Appellees, G. Hugh Wamble, Verline Cobbins and 38 others who intervened as plaintiffs in the court below cross appeal from a judgment of the United States District Court for the Western District of

Missouri. The lower court held unconstitutional the Title I program of the United States Department of Education and Blue Hills Homes Corporation for providing educational services for children in private church-affiliated schools under Chapter 1 of the Education, Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.* (1982), and appellees have moved to affirm that judgment. Through this Cross-Appeal, cross-appellants contend that the Missouri Title I program is unconstitutional because it advances and inhibits religion contrary to the First and Fifth Amendments to the United States Constitution, and because it violates the First and Fifth Amendment rights of Title I eligible students and their parents.

OPINION BELOW

The opinion below of the United States District Court for the Western District of Missouri is reported at 598 F.Supp. 1356 (1984), and is printed in the Appendix (cited as "Cross App. ____") to this Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions in this cross-appeal are the First and Fifth Amendments to the United States Constitution and Chapter 1 of the Education, Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 2701, *et seq.* (1982), are the statutory provisions. Relevant portions of the Constitution and statute are printed in the Appendix to the Jurisdictional Statement.

GROUNDS FOR JURISDICTION

Appellees invoked the Court's jurisdiction under Title 28 U.S.C. § 1252. This Jurisdictional Statement as filed and this Cross-Appeal is perfected in order to broaden and by more precision make more enforceable the relief provided in the judgment entered by the lower court and to preserve additional questions regarding the constitutionality of the Missouri Title I program. The judgment of the district court was entered on December 3, 1984, pursuant to the district court's Memorandum Opinion and Order filed on November 28, 1984. Appellees Dempster and Pauline Ferguson and other intervening appellees (84-1343), and William J. Bennett and others (84-1355) timely filed their appeal with this Court on the 24th day of December, 1984, and the cross-appellants-appellees received appellees' Jurisdictional Statement on the 25th day of February, 1985. This Cross-Appeal is in response to appellees' appeal, and consequently cross-appellants have not filed a Notice of Appeal prior hereto. Cross-appellants rely upon Rule 12.4 of the Supreme Court Rules. The main appeal and this Cross-Appeal involve the constitutionality of the Missouri Title I bypass program. Pursuant to 28 U.S.C. § 1252 this Court also has a jurisdiction of the issues raised in this Cross-Appeal. *See* also, *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981), and *United States* v. *Christian Echo Ministries, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

STATEMENT OF THE CASE

A. Lower Court Proceedings

This challenge to the Missouri Title I program began on April 4, 1977, when cross-appellant-appellee-Wamble, claiming standing as a federal taxpayer, filed his complaint in the United States District Court for the Western

District of Missouri. As noted (Appellees Ferguson J.S. at 5), "[t]hirty-nine federal taxpayers, including seven parents of public school students eligible to receive Title I assistance, were permitted to intervene as plaintiffs on September 13, 1978, and are also appellees in this appeal." Extensive discovery and pretrial preparation preceded a 21-day trial on the merits. Approximately 800 documents were introduced into evidence.

On November 28, 1984, the district court filed its decision and on December 3, 1984, entered its judgment in accordance therewith. The court held that the Title I bypass program as administered in Missouri on the premises of religiously affiliated schools violates the First Amendment.

The court refused to stay disposition of the case but did stay enforcement of its injunction of the Title I program pending disposition by the Supreme Court of *Aguilar* v. *Felton*, Nos. 84-237, 84-238, and 84-239 (question of jurisdiction postponed to hearing on merits, October 9, 1984). Appellees filed their Notice of Appeal on December 24, 1984. Cross-appellants seek affirmation of the lower court judgment in a separate motion, as well as the relief sought in this Cross-Appeal.

B. The Missouri Title I Program

The Title I bypass program, as reviewed by the court below, followed this Court's decision in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), and the subsequent 1974 congressional amendment to Title I authorizing a bypass of state and local authorities in the delivery of Title I services. This Court ruled that Title I services contemplate and require the participation of private school children to a degree comparable to public school children. An order of remand in *Wheeler* v. *Barrera*, required the district court

to propose guidelines assuring, among other things, accommodation of state constitutional requirements regarding separation of church state. Instead of following the court's guidelines, federal officials proceeded to take steps leading to a decision to implement the Title I bypass in Missouri so as to require Title I personnel to provide instructional services on church school premises during regular school hours. This decision was made on July 22, 1976. The decision was extremely controversial and from the very beginning presented a framework for administration which both advanced and inhibited religion.

The testimony, by and large, which comprises the extensive record before the Court in this case is in the form of testimony of witnesses who were essentially hostile to the position being advanced by cross-appellants. Even so, the record contains numerous examples which indicate that the services provided by BHHC are directly related to and unavoidably advance the religious mission of the schools whose students' learning abilities such services are designed to assist.

But other problems are evident. Part of the problem was the use of an independent contractor who was religiously affiliated with the Catholic Church. The district court made this observation:

> While the religious affiliation of government employees, officers, or contractors in most circumstances is irrelevant and in no way offends the Constitution, *see, e.g., McDaniel* v. *Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), this court notes in this case that the use of a religiously affiliated organization staffed exclusively at the inception of the program by people who were in one way or another affiliated with the Catholic Church, to implement a federally funded program in religiously affiliated schools, flew in the face of Congressional intent and

> violated the Establishment Clause. Congress intended to substitute a religiously *neutral* organization for SEA-LEA agencies whose operations were prohibited by local or state law. Implementation, management, and supervision of the program by a puppet of the Church, however well-intentioned, is tantamount to direct fiscal government aid to religiously affiliated schools.

(Cross-App. 16a-17a)

In an attachment to its progress report of January 15, 1978, to the USOE, BHHC indicated that it needed "resolution" from nonpublic principals and teachers to the effect that missing one subject is not detrimental but in fact helpful because the student can be helped by learning to read and do math. (*See* note in PX 151-B at 3.) Billy Tippin, instructional supervisor for BHHC, testified that the Title I bypass program "provides the assistance these students need in their basic subject areas which they cannot get in the regular classroom due to the fact that the classroom teacher has more students and she is unable to individualize as much as the Title I teacher would be able to do" (Tippin, 15 Tr 5).

Although it is the contention of the appellees that Title I is an aid to the child, and not the school, Otis Baker, who is coordinator of the Elementary and Secondary Education Programs for Missouri, stated that "Title I is, in fact, the largest, I believe, federal program of aid to public schools. Its purpose is to provide supplementary assistance to enable public schools to improve programs, educational programs; specifically for students who reside in low income attendance areas and who need special education assistance" (Baker, 2 Tr 9). In fact, it is the declared policy of Congress that Title I-ESEA was enacted "*to provide financial assistance to local educational agencies* with concentrations of children from low income fami-

lies *to expand their educational programs* by various means which contribute to meeting the educational needs of educationally deprived children." 20 U.S.C. § 2701 (Emphasis added).

The record below demonstrates that this purpose under the bypass serves to expand the educational programs of parochial schools where the services are provided on-site and exclusively to the children attending those schools.

This purpose was in fact confirmed in correspondence, and testimony was elicited from witnesses supporting the notion that the purpose of the Title I program as administered under the Missouri bypass was to enhance the parochial school program. (PX 51; Porath 3/15/78 dep 22). In filling out standard school survey forms, the record demonstrates that Catholic schools, serving students enrolled in Our Lady of Americas School in Kansas City, placed a value on Title I services for the 1978-79 school year (Hagan 7 Tr 72).

If the program, as administered, is truly a public benefit program, no child should be excluded because of his or her parents' religious beliefs and practices. Yet, the program as administered permits the parochial school and BHHC to make the administrative decision concerning whether a child attending that school may so benefit. Thus, according to the testimony of Otis Baker, there are church affiliated schools where children do not benefit from the program. These include Amish, Mennonite, Seventh-day Adventist, and Christian day schools (Baker, 2 Tr 5-8).

Another factor, demonstrated by the record on this question of discriminatory impact was the fact that the bypass contractor served only in areas where there are ten or more eligible private school children. This cutoff point determined by BHHC effectively excludes many

children whose parents have exercised their constitutionally-protected right to send them to a church school. They would have no access at all to Title I services if the cutoff point had not been reached. Prior to the bypass program, all such children would have had the equal opportunity to receive Title I services offered by the public school district (Baker, 2 Tr 73-75).

Under the Title I program, as operated by the federal government through BHHC, a child may be excluded from Title I benefits as a result of the parents' choice of sending the child to a church-operated school which does not wish to have the government in any way interfere with its religious mission. This of course is a right guaranteed by the First Amendment.

The Title I program in many instances relieved the church school from providing remedial services, which it had and still does provide, to its students not otherwise eligible for Title I benefits (Mullin 3/8/82 dep 57-65, 100-101; Toole dep 110-111; Chausse dep 58, 59-64, 112-113; PX 1225).

The current arrangement forces parents to choose between following the precepts of their religion and forfeiting Title I benefits for their children, on the one hand, and abandoning one of the precepts of their religion in order to obtain these benefits, on the other. Under the principles set forth in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), the least intrusive arrangement would be a program that provided Title I services to all eligible students at a religiously neutral site.

Some of these problems were revealed through the testimony of Wilbur Cheatham, director of compensatory education for the United States Department of Education, who had general administrative responsibility for Title I (Cheatham, 10 Tr 82). Mr. Cheatham stated that if

a nonpublic school does not elect to participate in the Title I program, a child otherwise eligible for Title I benefits, but attending such a nonpublic school, would not be served. In fact, according to his testimony, most Seventh-day Adventist schools elect not to participate (Cheatham 12 Tr 114-22).

Parents in the community perceive the Title I bypass program to be a part of the parochial program. Indeed, when parochial schools consider Title I programs to be "our" programs, the constitutional evil is not theoretical—it is real. If one person in Missouri is, on the basis of religious grounds, excluded from this program because of religious beliefs, the program is unconstitutional.

The Court is directed to *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which expressed that very concern in a comment made by Mr. Justice White in footnote 2 of *Lemon*, *id.* at 671:

> As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

Wamble presents just such a set of circumstances. Not only do the church-operated schools establish priorities for admission based upon religious faith (PX 15; PX 429; IDX 13; PX 943 at 4; Bremer 3/16/82 dep 7), but many of the parochial schools have admissions requirements that are religiously unacceptable to a large number of non-Catholic or non-Lutheran parents.

At DePorres School parents must belong to some "Christian" church (PX 1247; Spies dep 10; Moll dep 10). Our Lady of Perpetual Help in St. Louis refuses to accept students without a parent's faith statement professing faith in God and signed by the parent's minister (Chausse dep 9, 43-44). At Trinity Lutheran in St. Louis to re-enroll there must be a demonstration of Christian growth (PX 1269 at 4; Bremer 3/16/82 dep 62-63; PX 943 at 4). In the Diocese of Jefferson City the Catholic schools take into account the financial and personal support of the Catholic Church by the parents (PX 429).

In order for a student to be enrolled in a church school in which a Title I program is conducted, the parents must agree that their child will participate in religious instruction through regular religion classes and other religious exercises (PX 1235 at 2; PX 1247 at 31; PX 1246 at 1; PX 1261; PX 1269; Mullin 3/8/82 dep 70-71; Volker dep 16, 142; Spies dep 58-59; Eckhoff dep 16, 79; Bremer 3/16/82 dep 16, 60). In fact, the Archdiocese of St. Louis conditions admission of non-Catholic students to the parents' agreement that their child participate in a study of the Catholic faith and those values it teaches, as well as the attendance at religion classes, including those pertaining to the sacraments (PX 1246; IDX 11, nos. 5110.2).

All students enrolled in a Title I program conducted within a church-operated school must be enrolled in that school, and the students are still subject to the school's rules and regulations while they are attending the Title I classes (Volker dep 80; Hagan, 7 Tr 80-81; Spies dep 99-100). A child suspended from attending classes at a church school is automatically suspended from attending Title I classes even if the suspension is not due to misconduct in Title I (Chausse dep 81; Eckhoff dep 105; Volker dep 82; McCloud dep 41-42; West dep 64-65).

Tuition charges imposed by most of the Catholic and Lutheran schools is also less for children of parents who are members of the church with which the school is affiliated (Volker dep 76-78; Spies dep 21; Bremer dep 3/16/82 at 19; PX 1260 at 5; PX 919 at 3).

THE QUESTIONS ARE SUBSTANTIAL

A. Unequal Treatment

The Title I bypass in Missouri violates rights of parents and their children not to be deprived of full access to federal educational benefits where access is reduced simply because such parents decide not to opt for church-related schools. Such parents, though otherwise eligible, may object to the inculcation of its religious tenets, where Title I services are provided by BHHC. Or they may be unable to afford such schools, or to qualify for them at the same tuition rates as those available to members of the school's dominant religion.

It should be emphasized that parents and children have a fundamental right, under the due process component of the Fifth Amendment, as well as under the First Amendment, to choose, without resulting governmental burden or penalty, whether to attend a public school, a private non-sectarian school, or a private sectarian school. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). If the program is a public benefit program, its site of administration must not be such as to cause the exclusion of any who might otherwise be entitled to those services. No religious test or requirement can condition entitlement to such benefits. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Weisman* v. *Updegraff*, 344 U.S. 183, 191-192 (1952). Limiting attendance in the BHHC-conducted Title I program to those students enrolled at the parochial schools is a patent violation of the First Amendment.

Under *Thomas* v. *Review Board of Indiana*, 450 U.S. 707 (1981), no such right may be penalized through a scheme that, for whatever benign reason, reduces access to a public benefit as a consequence of the individual's religiously-motivated choice, at least absent a showing of compelling necessity for the state to impose such a penalty, cf. *Sherbert* v. *Verner*, 374 U.S. 398 (1963). As recently as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), in a case also coming from Missouri, this Court applied this standard to strike down a state educational rule governing access to public educational facilities in terms of a criterion that failed to be religiously neutral. Title I has precisely the same defect. Every dollar of service it makes available for church-related schools and the students choosing to attend those schools is directly subtracted, and on more than a one-to-one basis, from the services left over for otherwise indistinguishable students choosing not to attend church-related schools.

The problem is not solved by the fact that Title I services are available in the public schools. There is no guarantee that the opportunity to receive Title I benefits will be as great at the public school as at a parochial school where the percentile score for eligibility may be higher.

Appellees claim that this is a public program and not a parochial school program. Nevertheless, to qualify for instructional services under Title I bypass in Missouri, a student *must* attend a private school where the bypass operates (Tippin, 15 Tr 141)). The federal government has identified those private schools in Missouri — first in solicitation for bids requests (*e.g.*, PXs 96, 99, 117, 229) and later in statements of work (PX 116 at 2-14).

Full access to federal educational benefits should not be reduced because of religious, economic or other reasons if

otherwise eligible. As this Court stated in *Sherbert* v. *Verner*, 374 U.S. 398, 410 (1963):

> No State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of welfare legislation.

This, too, is another factor which distinguishes this case from *Aguilar*. *Aguilar* contains no record on that issue. However, in this case it is obvious from the record that many such examples exist in the Missouri program. One such problem described by Otis Baker in his testimony involved the level at which students are chosen to be considered eligible for the program. He testified that the bypass arrangement in some respects tends to favor private school students, who, as a rule, seem to have higher percentile scores on achievement tests. Thus, he testified that with much higher scores and relatively less need for Title I services, it was "distinctly possible that the lowest performing student being served in a private school might score at or near the 30th percentile, while no public school student scoring that high could be served." (Baker 2 Tr 95-98) In other words, entry into the program was affected because historically public schools have a higher concentration of students with learning problems and possibly lower socio-economic levels than nonpublic students. To this extent the program obviously favored religion, and this was confirmed by testimony of those administering the program.

B. Advancing Religion

The responsibility for selecting the students for bypass instruction was, according to a bypass teacher, made by the bypass teacher and the school principal and her staff (Jimenez 3/12/79 dep 30). The testimony further demon-

strated that the bypass teachers exercised this responsibility in conjunction with the various contacts they had with church school personnel in applying the basic criteria (Cole, 5 Tr 83; Rustige dep 29-39; Kracke dep 24; McCloud dep 83; Toole dep 33-34, 188; West dep 11).

In this regard also the symbols and artifacts of religion serve to illustrate the problem inherent here. This is more than a problem with the presence of a crucifix. When a program deals with impressionable young minds, the significance of symbols is more profound. It also creates precedence for a more dangerous incursion. Professor Tribe in *American Constitutional Law* § 14-12 at 868 (1978), has noted:

> [T]he experience of living in a political community which endorses or affirmatively supports religious positions with which one disagrees may be regarded as a peculiar offense to freedom of conscience. It may be this concern that can best explain the Court's repeated insistence that the political system must not be fragmented along religious lines. For if it is not the activity of enthusiastic religious advocacy in the political realm that is to be condemned . . . then it must be the enlistment of the official apparatus of politics to religious ends offensive to particular individuals that is of underlying concern.

Id. at 869.

Even the mere appearance of secular involvement in religious activities is suggestive to the impressionable student. This raises not only the specter of excessive governmental entanglement, but the unconstitutional act of actually advancing the cause of religion through the use of federally supported programs intended to benefit all children.

C. Interference With Independence Of Institutions

Interference with the "independence of the institutions" is a wrong which Justice O'Connor warned against in her concurring opinion in *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984). She indicated that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions, giving the institutions access to government or governmental power not fully shared by nonadherents of the religion, and foster the operation of political constituencies defined along religious lines." *Id.* at 1366.

The record demonstrates that kind of interference. In many instances the Title I teacher working closely with students in the religious setting seeks the advice and counsel of others present in that setting. For example, John P. Cole, executive director of BHHC, testified that the presence of a priest during the course of the school day would not be discouraged or prohibited. Cole in fact stated in a somewhat defensive manner that the presence of a priest would not "contaminate" the learning process. (Cole, 6 Tr 76)

Such a situation creates a breach of the wall of separation between church and state. It involves the state in a joint venture with religion. In *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Court stated, "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127.

The full extent of this religious involvement simply could not be effectively monitored. In answer to a question concerning the monitoring process, Terry Livingston

of the office of the inspector general, who was its auditor in charge, stated as follows:

> If I was [sic] to give an honest answer I would have to say not effective. If they are going to do those kinds of activities I doubt they would be doing them when we were on-site unless we were to do some sneak preview and walk in and catch you or something like that. But we go in and identify previously we are coming in, that sort of thing.

(Livingston, 14 Tr 71-72).

Even with prior notification, religious symbols were found in Title I rooms. During the trial this was defended by claiming a so-called "child benefit theory," but extending the theory in a manner so as to permit public funds to be used for the support of a teaching staff on the premises of parochial schools. However, the record below demonstrates that this case involves teachers, a substantial portion of whom are of the same religious faith as that of the sponsoring church. This obviously presents sensitive problems since the teachers must operate within the religious atmosphere where often they are of the same religious faith as the sponsoring school. The record shows that this is not a matter of attempting to achieve neutrality on the question of instructional material and equipment. The use of public funds in the manner borne out by the record in this case demonstrates that there is no logical stopping point. For example, what is the constitutional distinction between sending a teacher onto the premises of a parochial school to provide remedial reading services and sending a teacher to a parochial school to teaching reading itself? In both instances, services are directly related to the advancing of the religious mission of the school whose students' learning abilities such services are designed to assist.

D. Least Entangling Alternative

In order to fully understand the discriminatory impact of the Missouri Title I bypass program, one cannot ignore the directives set forth by this Court in *Wheeler* v. *Barrera*. The concern for the delivery of comparable services was intended by the Court to vest in the state and local agencies, not the federal courts, 417 U.S. at 428.

This Court obviously was concerned about the delivery of a nondiscriminatory program. A program which provides instruction and equipment to the public school children and the same equipment but no instruction to the private school children, cannot on its face be comparable. In order to equalize the level and quality of services offered, something must be substituted for the private school children. In a footnote the Court set forth some of the possible programs suggested in the Senate Committee:

> A listing of possible programs suggested to the Senate Committee appears in S.Rep. No. 146, 89th Cong., 1st Sess., 10-11 (1965). Among the examples there listed are teacher aids and instructional secretaries; institutes for training teachers and special skills; supplementary instructional materials; curriculum materials center for disadvantaged children; preschool training programs; remedial programs, especially in reading and mathematics; enrichment programs on Saturday morning and during summer; instructional media centers to provide modern equipment and materials; programs for the early identification and prevention of dropouts; home and school visitors and school workers; supplemental health and food services; classrooms equipped for television and radio instruction; mobile learning centers; educational summer camps; summer school and day camps; shop and library facilities available after regular school hours; work experience programs; Saturday morning and special opportunity

> classes; home oriented book mobiles; after school study centers; and pupil exchange programs.

Wheeler, 417 U.S. at 425, n. 20.

The government has failed to demonstrate why one of the above alternatives would not be viable. This Court in *Walz* v. *Tax Commission*, 397 U.S. 664, 674-676 (1970), seemed to opt for selecting the least entangling viable alternative available when there is potential for excessive entanglement.

Here the least entangling alternative would be a program operated by local school agencies on a religiously neutral site. *See* also *Wolman* v. *Walter*, 433 U.S. 229, 247 n. 14, (1977), for a discussion concerning public centers or mobile units near the non-public school premises; also *Wheeler*, 417 U.S. at 425, suggesting the use of neutral sites to replace on-premises instruction.

Judge William Collinson, acting on remand with instruction from the Supreme Court in *Wheeler*, approved a state plan proposed by the Missouri SEA. The purpose was to assure that services for private school children are comparable in scope and quality to the services for public school students. According to the record, the locally-operated plan required equal expenditures in the range of 90% to 110% of the per pupil average of expenditure for public school students (PX 283, p. 5 cf. Cheatham, 10 Tr 100-101). However, on August 21, 1975, the Education Department of the Missouri Catholic Conference attacked the newly approved state plan and proposed strategies for obtaining federally-operated on-premises Title I services during regular school hours.

On September 3, 1975, the clerk of the Eighth Circuit Court of Appeals was advised by an attorney on behalf of *Barrera* that the U.S. Commissioner of Education would

institute the Title I bypass in Missouri. Consequently, the federal government, in proceeding with a bypass, removed from the state authorities the opportunity to carry out the Court's mandate in *Wheeler*.

The bypass plan implemented was certainly not the least entangling alternative. The on-premises program to provide instructional services in Missouri was delivered by a religiously affiliated contractor in a pervasively sectarian setting.

The Title I room in many instances is located within and subject to enrollment program and activity requirements of the church school. Such an arrangement is an impossible situation because, as noted earlier, the parochial schools consider the Title I program as being their "own." The services are provided exclusively to the children of that school and in a room which is at least physically an integral part of the church institution itself. In many instances it is used at other times during the day for other classes where teachers provided by the school itself instruct.

Examples of this difficult situation abound. Mr. Schmiedeler testified "[w]e are operating Catholic schools, and I would think we would want to reserve the right in some cases where we could discriminate by religion" (Schmiedeler, 20 Tr 32-36). Announcements aimed at the parochial community in some cases solicited teachers for the Title I program, and in other cases parents for Title I meetings (PX 1264-C); in other cases the school boasted of its "Title I services" (PX 1269 at 7).

The principal of Our Lady of Americas School, when asked if the school had "any kind of program for remedial math and reading for children that do not reside within Title I target areas," responded in the negative, but

stated the classroom "teachers keep them after school with no pay" (Wurtz, 20 Tr 192). She also stated that parents of Title I students are not told that federal funds are used to pay for the Title I services *(ibid)*. The record contains numerous other examples, and the flavor of the testimony of witnesses, who basically sought to defend the program, in many cases exuded a parochial attitude toward "their" Title I rooms and services offered at their schools.

Some of the school bulletins boasted of the availability of Title I services for many of "our" children." (PX 1260 at 11) In September of 1979, in an issue of the "Weekly Announcement Sheet" for the Central City Lutheran School (PX 1264-G) appeared the following statement: "Mrs. Rose, the Title I reading teacher, tells us that a job is available as a teacher's aide in the Title I room at Central City Lutheran School for four hours per day (8:00 a.m.-12:00 Noon). The requirements are the following: (a) at least a high school diploma; (b) real interest in kids. Please all the school if you feel you can help. This is a paying position."

The dangers prophesied by this Court in its teachings have come to fruition in the "show me state." The ill-conceived program to administer Title I funds violates the First and Fifth Amendments to the United States Constitution.

No test or guideline has been developed to prevent the invidious discrimination or lack of equal treatment among the possible religious schools competing for public moneys. Even though it is contended that students are not solicited, in some cases the program was actually shown to be offered in the parochial school handbook under the curriculum section. Although the exact number was not demonstrated in the record, a large number of

teachers in the Title I program taught in schools which were affiliated with his or her own faith. The appellees sought to avoid this issue by selecting only three Title I teachers to testify at trial, all of whom held religious beliefs contrary to those of the sponsoring church school in which they taught Title I remedial courses.

However, the questionnaire (DX 3C) showed that 13 of 21 bypass teachers and aides who identified themselves as Catholics serve only in Catholic schools, 6 serve in a Catholic school and in a non-Catholic school, one serves in two Catholic schools and one Catholic school, and only one serves in a non-Catholic school; a person self identified as a "nonpracticing Catholic" serves only in a Catholic school. Of the seven Lutheran bypass teachers (DX 30), two serve in non-Lutheran schools. Thus, the concern expressed by this Court in *Lemon*, 403 U.S. at 618-19, has important bearing on this issue. The Court in *Lemon* noted that even with the best of intentions teachers who must teach in a school affiliated with his or her own faith would find it difficult to make a total separation between secular teaching and religious doctrine.

The danger of subtle pressures has been mentioned before. The danger is self-evident here. As Title I teachers expand the amount of time in which they teach in a particular parochial school, their program becomes coextensive with the program of the school, and there arises a greater potential for impermissible fostering of religion.

The Missouri Title I program as administered on the premises at parochial schools in Missouri is clearly unconstitutional. The lower court correctly declared that this pervasively sectarian operation violates the excessive governmental entanglement test of the Establishment Clause to the First Amendment. But the lower court also

observed facts which support a finding based on the primary effect prong of the Establishment Clause violation test. The district court held that the Title I classrooms are contained in schools ". . . in which education is an integral part of the dominant sectarian mission of the church and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained." (Cross App. 24a) The court also noted the "correspondingly high risk of indoctrination" in the relationship between the government and the religious authorities (Cross App. 26a).

Declaratory And Injunctive Relief

The lower court did not grant declaratory relief, and the injunctive relief granted did not go far enough to address the gravity of constitutional wrong involved in this case. A description of the BHHC history briefly mentioned earlier is offered to support this claim.

The district court found that the "[i]mplementation, management, and supervision of the program by a puppet of the Church, however well intentioned, is tantamount to direct fiscal government aid to religiouly affiliated schools." (Cross. App. 16a-17a) The court, however, concluded that cross-appellants' challenge to the original contract was rendered moot by the expiration of the initial contract, and, because BHHC changed the composition of its staff and board of directors, "transforming BHHC into what was *ostensibly* an entirely neutral organization." (Cross App. 17a) (Emphasis added.)

The court's conclusion as to BHHC's ostensible neutrality is contradicted by current constitutionally relevant facts. BHHC's president is the same priest of the Roman Catholic Church who founded BHHC and has always served as its president. Its executive director is

and always has been appellee John P. Cole, who is the former superintendent of schools for the diocese of Kansas City-St. Joseph, the students of which currently make up a substantial portion of the Title I bypass recipients. The board of BHHC still continues to have members closely identified with the Catholic Church which sponsored its creation (Rotert, 3 Tr 17, 20, 32, 48). The bylaws of BHHC continue to identify as its principal office the same address as a diocesan institution (DX 7, Art. V, sec. (1); PXs 1002, 1003).

This lawsuit was filed on April 4, 1977. Shortly thereafter, BHHC was awarded a bypass contract. The BHHC contract did not expire until July 31, 1982 (Cross App. 9a). "The court placed counsel on . . . a 'fast track' in late 1981 to complete discovery, and trial preparation, and . . . the case finally came to trial on August 2, 1982" (Cross App. 2a) BHHC is still the bypass contractor under a new contract (Cross App. 9a). It thus has not "evaporated or disappeared" as an actor in this case, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974), and the parties, including appellant, Blue Hills Homes Corporation, still have adverse interests in controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil*, 312 U.S. 270, 273 (1941).

If BHHC has become less openly sectarian, as the district court suggests, that has only occurred long after the filing of this action and shortly before the commencement of trial. BHHC has failed to carry its heavy burden of proving that "there is no reasonable expectation that the wrong will be repeated," *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). After all, BHHC is a major actor in the Missouri bypass, and it is "the cumulative impact of the

relationship" which gives rise to excessive entanglement between government and religion. *Lemon* v. *Kurtzman*, 403 U.S. at 613-14.

It has been stated that courts consider the public interest involved in deciding whether to grant declaratory relief. *Virginia Ry* v. *System Federation No. 40*, 300 U.S. 515 (1937). The issues involved in this case raise substantial questions of interest to the public.

The constitutional restrictions applicable to public school districts providing instructional services on church school premises can be no less demanding than constitutional restrictions applicable to BHHC. A line of cases of this Court from 1947 to the present requires that public schools shall be religiously neutral and free from sectarian influence, sponsorship, support and involvement. *Everson* v. *Board Of Education*, 330 U.S. 1, 15-16 (1947); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 215, 222 (1963). BHHC failed as to all the aforesaid proscriptions.

Cross-appellants are entitled, as a minimum, to a declaratory judgment requiring that any contractor employed by the United States Government to provide instructional services on the premises of parochial schools must be and appear to be free from sectarian influence, sponsorship, support or involvement.

CONCLUSION

If the Court does not grant cross-appellants' Motion to Affirm in Nos. 84-1355 and 84-1343, we request that the Court note probable jurisdiction and grant a plenary hearing. We further request that this case be expedited so that a decision may be forthcoming along with *Grand Rapids* and *Aguilar*, or, in the alternative, that the deci-

sion at least in *Aguilar* be deferred so that both *Aguilar* and this case may be ultimately jointly considered by this Court.

Respectfully Submitted,

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Dated March 27, 1985

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0254-CV-W-8

G. HUGH WAMBLE, *Plaintiff*,

and

VERLINE COBBINS, *et al.*, *Intervenor-Plaintiffs*,

vs.

TERREL H. BELL, Secretary of the
United States Department of Education, *et al.*, *Defendants*,

and

DEMPSTER AND PAULINE FERGUSON, *et al.*,
Intervenor-Defendants.

FILED
NOV 28, 1984

MEMORANDUM OPINION AND ORDER

Prologue

This multi-faceted constitutional challenge to a significant federal educational program was first filed in this court in April of 1977. It has made its tortuous way through three divisions and before as many judges of this court, finally coming to rest in this division in late 1981. Before assignment of the case to this division, discovery and trial preparation proceeded apace until a stay was entered by Judge Collinson on March 30, 1979, pending the outcome of a similar case, *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (hereinafter referred to as *Pearl*).

Pearl was decided on April 18, 1980, the final stay order was lifted, and extensive discovery was conducted from that time until transfer here. The court placed counsel on what was characterized as a "fast track" in late 1981 to complete discovery and trial preparation, and after four and a half years of pendency the case finally came to trial on August 2, 1982. During the next five months the court held twenty-three separate days of trial.

After trial and extensive post-trial briefing there began a series of suggestions by one party or the other that the court delay its decision in the case until the opinions in several cases pending elsewhere were handed down. The last of such cases was *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, ___ U.S. ___ (1984),[1] and it is now suggested that action by this court should be further delayed pending the Supreme Court's decision in *Felton*, certiorari having been granted on October 1, 1984. While that decision may very well affect the result reached here, the court is convinced that the time has come to rule and let this decision assume its proper role in this on-going drama.

Introduction

Before the court is an Establishment Clause challenge to federal legislation, Title I of the Elementary and Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (hereinafter Title I), designed to provide remedial education services for public and nonpublic school children who reside in low-income areas and

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[1] Judge Friendly of the Second Circuit in *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, ___ U.S. ___ (1984), provided a chronological discussion of the Supreme Court's relevant decisions with regard to government aid to religious schools. In fact, *Felton* is strikingly similar in its facts and issues to the case at bar and this court finds Judge Friendly's exposition of the development of the law to be thorough and persuasive. We, therefore, adopt his analysis, limiting this discussion to the law as it relates to the facts before us.

whose scholastic or testing records demonstate a need for such services. This action was originally brought by Dr. Hugh Wamble, an individual taxpayer. Thirty-two other taxpayers and seven parents of public school students entitled to receive Title I assistance later were permitted to intervene as plaintiffs (hereinafter with Dr. Wamble jointly referred to as plaintiffs unless otherwise specified) against the defendants named by Dr. Wamble, to wit: the Secretary of the United States Department of Education (hereinafter USDOE or the Secretary),[2] Blue Hills Home Corporation (hereinafter BHHC), the entity contracting with USDOE to provide Title I services for Missouri's nonpublic school students, and BHHC's Executive Director John P. Cole. Thirteen parents of students in religiously affiliated schools were permitted to intervene as defendants (hereinafter with the originally named defendants jointly referred to as defendants unless otherwise specified). Jurisdiction is appropriately invoked pursuant to 28 U.S.C. §§ 1331, 1391, 2201, and 2202.

Plaintiffs challenge the Secretary's decision to invoke the "bypass provision" of the Act in question, 20 U.S.C. § 3806(b), which authorizes payment of funds to an independent contractor who provides services in parochial schools in jurisdictions where the public education authority either will not or cannot administer the funds in parochial schools. Plaintiffs condemn the contractor, BHHC, as a religiously affiliated and controlled organization, seek to enjoin permanently the operation of Title I in Missouri's nonpublic schools and request a declaratory judgment that the bypass statute on its face and as administered violates the First Amendment prohibition against establishment of religion.

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[2] Prior to the May, 1980, creation of the Department of Education, the Commissioner of the United States Office of Education administered Title I. Because this case was filed prior to the existence of the Department of Education, the court could have referred to the Title I administrator at the federal level as either the Secretary or the Commissioner.

Specifically, this case presents two fundamental questions: (1) Does this federal statute which authorizes the payment of funds to an independent contractor with directions to that contractor to provide remedial services for educationally deprived children residing in low-income areas and attending nonpublic schools, the majority of which are church-affiliated, on its face violate the Establishment Clause of the First Amendment to the United States Constitution? (2) Assuming *arguendo*, that Title I is not unconstitutional on its face, does Title I as administered on the premises of Missouri's parochial schools during the school day in rooms largely devoid of religious symbols by teachers paid and supervised by this independent contractor, nevertheless violate the religious neutrality and entanglement principles enunciated in *Wolman* v. *Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) and *Meek* v. *Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975)? After waiting for and studying opinions from other jurisdictions involving similar questions and upon careful review of the record made in this twenty-three day trial, this court answers the first question in the negative and the second question in the affirmative.

Background

Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (codified as amended 20 U.S.C. § 2701 *et seq.*) for the express purpose of funding locally administered compensatory learning programs—remedial education to benefit *all* educationally deprived children residing in low-income areas. *See* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] United States Code Cong. and Ad. News, pp. 1446, 1450. The Secretary administers Title I at the federal level, state educational agencies (SEA) normally implement it, and local educational agencies (LEA) customarily operate and manage the program on a day-to-day basis. 20 U.S.C. § 380 (West Supp. 1982).

All students who are educationally deprived, defined as below age-level in academic performance, and who reside in a

low-income area are eligible to participate in a Title I program, 20 U.S.C. §§ 2722, 3804, 3805, 3806. To receive federal funds to finance Title I programs for children in parochial schools, an SEA must file an assurance with the Secretary that a nonsectarian agency will control the funds and that the SEA will assure proper disbursement of funds through fiscal control. 20 U.S.C. § 3876(a). The related LEAs in turn file with the SEA applications describing the project and assuring the SEA that it will provide for equitable participation of all eligible children in the area regardless of whether they attend public or nonpublic schools. 20 U.S.C. § 3805(a) and (b). *See also* 20 U.S.C. §§ 2740; 3806(a), (b); 47 Fed. Reg. 52, 350 (1982) (to be codified at 34 C.F.R. § 200.70). Each LEA is responsible for insuring that the needs of nonpublic and public school children are met on a basis comparable in quality, scope, and opportunity, and that expenditures are equal.[3] 20 U.S.C. §§ 2740(a); 3806; 47 Fed. Reg. 52,350. In addition, Title I mandates that instruction supplement, not supplant, regular classroom instruction, 20 U.S.C. § 3807(b), and that "[n]othing in [Title I or its revised version effective October 1, 1982, Chapter I, 20 U.S.C. § 3801 *et seq.*] shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384.

Early Title I benefits for nonpublic school children in Missouri consisted of equipment and materials without instruction while public school children received on-site remedial instruction in reading, math, and verbal arts. In *Barrera* v. *Wheeler*, 475 F.2d 1338, 1353 (8th Cir. 1973), the Eighth Circuit held that the Missouri Commission of Education and the Missouri Board of Education failed to provide comparable services to both public and nonpublic school children.[4] Pending appeal to

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[3] The "equal expenditure" requirement became a part of the statute in the 1978 amendments to Title I found in Pub. L. No. 95-561, 92 Stat. 2153 (codified at 20 U.S.C. § 2740(a)).

[4] The history of litigation over Title I in Missouri is well-documented. During the 1970's, the court in *Barrera* v. *Wheeler*, 531

the Supreme Court, the Honorable William R. Collinson of this district issued an injunction ordering the LEAs to provide comparable services to nonpublic school children—remedial instruction in the nonpublic schools by public teachers during the regular school day. During the 1973-74 and 1974-75 school years, eligible children were released from their regular classes to attend a separate Title I class, known as "pull-out,"—which supplemented rather than supplanted regular instruction.

In 1974, the Supreme Court affirmed the Eighth Circuit, holding that the services provided to the nonpublic school students "were plainly inferior, both qualitatively and quantitatively." *Wheeler* v. *Barrera*, 417 U.S. 402, 415, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974). The court declined, however, to decide whether Title I's mandate for "equitable participation" was a requirement of on-premise instruction or whether such on-premise instruction would be constitutional. Instead, it remanded the case to Judge Collinson to develop guidelines designed to assure LEA compliance in Missouri with Title I.

Later in 1974, Congress amended Title I to remedy inequities allegedly found in Missouri and elsewhere caused by state or local laws which prohibited state agencies from offering equitable participation to eligible nonpublic school children. It authorized the Secretary in such a circumstance to *bypass* state and local authorities and to provide Title I services directly to educationally deprived nonpublic school children through the use of independent contractors unrelated to

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F.2d 402 (8th Cir. 1976) referred to the "apparently endless legal battle" over this statutory program. Questions about Title I have been addressed in *Barrera* v. *Wheeler*, 441 F.2d 795 (8th Cir. 1971); *Barrera* v. *Wheeler*, 475 F.2d 1338 (8th Cir. 1973); *Wheeler* v. *Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974); *Mallory* v. *Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

state or local governmental agencies.[5] Pub. L. No. 93-380, 88 Stat. 484 (originally codified at 20 U.S.C. § 241e-1 (1976)); 20 U.S.C. §§ 2740(b), 3806(b).

In Missouri, the Secretary initially took no steps to implement a bypass program. USDOE viewed the services required for nonpublic school students under Judge Collinson's injunction as comparable to those provided for public school students. On remand in 1975, however, Judge Collinson dissolved the injunction and accepted the Missouri SEA's plan to approve LEA applications, a plan providing for equitable expenditures but otherwise failing to ensure a program for nonpublic school children comparable in size, scope, or opportunity to the program offered to public school children. *Barrera* v. *Wheeler*, 531 F.2d 402, 406-07 (8th Cir. 1976). For nonpublic school children, LEA applications provided for instruction given on the premises of *private* or *public* schools before or after regular school hours or on Saturday. Public school children continued to receive "pull-out" instruction on-premises during the school day. For a variety of reasons not unrelated to parent, pupil and school administration reaction to off-premise instruction (*see* p. 10 infra), the number of private school children accepting the offered service dropped to one-half the number previously served under the Collinson injunction.

In 1976, representatives of parochial schools in Missouri asked the Secretary to consider a bypass of the state and local educational agencies. This request followed a decision by Missouri Commission of Education that administration of an on-premises program by the state with public funds provided by the USDOE violated the Missouri Constitution.[6] A USDOE

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[5] The costs of the bypass services, including any administrative costs, are deducted from the funds made available to the LEAs and SEAs in the affected area. 20 U.S.C. § 3806(b)(3)(A); 34 C.F.R. 20195(c).

[6] The Director of Governmental Programs for the Archdiocese of St. Louis suggested a form letter for use by parocial school adminis-

investigating team then reviewed the statistics demonstrating the number of pupils participating, studied the LEA project applications and met with state and local staff as well as parents. It investigated accusations that the decline in participation in the off-premises program was caused by a parochial school boycott. After a thorough investigation, the team concluded that the poor attendance was due to student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with family obligations. Poor attendance was *not* due to a boycott. In addition, the team found that 31.2 percent of the Title I budget for nonpublic schools was spent on teachers' salaries and 40 percent was spent on non-instructional costs such as transportation and facilities rental. In stark contrast, 72.8 percent of funds in the public schools was applied to teachers' salaries.

On July 22, 1976, following this investigation, the Secretary concluded, pursuant to 20 U.S.C. § 3806(b)(2) of the bypass

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trators in protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools; the SEA received a "substantial amount of mail" from parochial school principals and parents of parochial school students, the "great majority of which related to the provision of Title I services in private schools during the school day," Tr. II at 17-18; and certain parochial school administrators of Catholic and Lutheran schools in Missouri wrote a letter to USDOE seeking the invocation of the bypass because of their belief that the programs offered to nonpublic school students were not comparable to those being offered to public school students. The letter was jointly signed by various superintendents.

Dr. Wamble, on the letterhead of the Missouri Baptist Convention and in his capacity as president of the convention also wrote a letter. In contrast to the position of the parochial school administrators, he encouraged Senator Eagleton to vote "no" on the then-*proposed* amendment and, in defining his support, he noted the size of the convention (1,840 churches with reported membership of 555,000) and the convention's long-standing opposition to tax support of education in church-related schools.

provision, that the four LEAs investigated "substantially failed to provide for the participation on an equitable basis . . . and the establishment of a 'bypass arrangement' to provide services . . . [was] warranted." *Plaintiffs' Exhibit No. 304.* This decision followed a September, 1975 Jackson County, Missouri circuit court ruling which affirmed the prior position of the State Board of Education that Missouri's constitution prohibits state involvement in the use of Title I funds for instruction given on the premises of parochial schools, a decision repeated by the Missouri Supreme Court on December 30, 1976, in *Mallory* v. *Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

After soliciting bids on three proposed bypass projects in Missouri, USDOE, on February 14, 1977, awarded contracts for three areas to BHHC. A fourth contract was awarded to BHHC on October 1, 1977 and, by the end of the 1979-80 school year, USDOE had consolidated its award for statewide nonpublic school Title I services under one contract with BHHC, bypassing fifty-three Missouri LEAs. This contract expired July 31, 1982. Under properly established contract procurement procedures, it was again awarded to BHHC for the 1982-83 school year.

Plaintiffs challenge the program in Missouri, alleging that BHHC is a religiously affiliated and controlled organization which, by receiving funds directly from the federal government for use in religiously affiliated schools, blatantly violates the prohibition against establishment of religion. This court agrees that at the time the initial consolidated award was made for the bypass program in Missouri, BHHC appeared to be a religiously affiliated organization even though its articles of incorporation, by-laws, and express purposes were entirely neutral. BHHC was incorporated on July 19, 1974, as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert. It originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were

persons known to BHHC through their common affiliation with the parochial schools.

By the time BHHC was awarded a second state-wide contract, it had changed its apparent character and became ostensibly neutral. In 1979, the organization moved from the buildings owned by St. Therese Church to a commercially owned mall. Further, its new board members were not predominantly Catholic, and it deliberately avoided questioning prospective teachers about their religious affiliation. Consequently, the court finds that teachers were not purposely placed in a school which matched their chosen religion. This finding is corroborated by the evidence which shows only an incidental overlap in this representation. Indeed, seventy-nine percent of the BHHC teachers were assigned to schools with religious affiliations different from their own. Finally, while plaintiffs argue that the executive director of BHHC, John Cole, a former Catholic priest, was offered the job because he attended seminary with Father Rotert, an incorporator, the evidence reflects and this court finds that his religious affiliation is not the primary reason he was hired. Other factors in his hiring were his life-long friendship with Rotert, his experience as a former USDOE employee, and the fact that he possessed "capabilities for the job." Tr. III at 27-28.

The bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations. USDOE requires BHHC to submit a Program Design on June 1 of each year which, when approved by USDOE, is the contractural basis for BHHC's obligation to provide Title I services the following year. No funds flow to the nonpublic school authorities.

In this case, the Program Design states that BHHC must provide services comparable to services provided by an LEA at the public school and it establishes procedures to compare costs, selection criteria, and the scope of the two programs. The educational services are provided *on site* at the parochial schools during regular hours. The services include sup-

plemental instruction in remedial reading, mathematics, and language arts for educationally deprived children residing in low-income areas and enrolled in nonpublic schools, the majority of which are sectarian. The contract requires staff orientation and in-service training, supervision and monitoring of staff, coordination of services and consultation with the classroom teacher, selection of materials to fit the needs of students, assurance that materials are used only for Title I purposes, communication with parents, and remedial instruction based upon the individual needs.

BHHC takes steps to ensure its own religious neutrality and tries, sometimes without success, to ensure that the teachers and classrooms are neutral. BHHC supervisors inspect instructional facilities to make sure that the sites are adequate and free of religious artifacts. All teachers are monitored and trained solely by BHHC supervisors. Orientation sessions include oral instructions designed to ensure religious neutrality,[7] and the 1982-83, "Chapter I Handbook" affirms that "BHHC must manage the instructional program separate from the nonpublic schools to insure . . . 'noninvolvement' and 'nonentanglement' . . ." *Defendants' Exhibit 53* at 21.

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[7] Oral instructions include 1) that the teachers are accountable only to BHHC supervisors and are not subject to the supervision or control of nonpublic school personnel; 2) that they are assigned to the nonpublic school solely to provide services to those students meeting the eligibility criteria and that they alone are responsible for the selection of those students; 3) that they are to consult with nonpublic school teachers and administrators about the educational needs of the students; 4) that they must assure that materials and equipment procured for Title I contain no religious content and are not used in the nonpublic school curriculum; 5) that they are not to engage in teaching or other cooperative instructional advitities with nonpublic school teachers; 6) they are not to become involved with the religious activities of the nonpublic schools in any way except to attend faculty or parent-teacher meetings to explain Title I; 7) that they are not to introduce or allow any religious discussion with any nonpublic school personnel; and 9) that they are to maintain the Title I classroom free of religious symbols.

Nonpublic school personnel exercise no control over the program, the teachers, or the Title I curricula. The Title I teachers indicate that they, like public school teachers, refrain from religious discussion and instruct students who bring up related topics to discuss them with appropriate personnel. Title I materials are used only for Title I purposes. However, nonpublic school *students* are ultimately under the supervision of nonpublic school administrators, and federal monitoring often *excludes* inquiries about religious neutrality.

Administrative involvement of the federal government or BHHC with the private school personnel can be divided into three general categories: (1) contact for the purposes of planning or scheduling; (2) consultation regarding the educational progress of Title I students; and (3) contact necessary to monitor the administration of the Title I program. The contacts necessary to plan and schedule the Title I program on-premises include identification of the Title I facility within each school, identification of students eligible to receive Title I, scheduling of private school classes with the Title I classes, verification that Title I supplements and does not supplant the private schools, planning of curricula, and attendance by Title I personnel at faculty and parent-teacher meetings to explain the program. In addition, Title I personnel and regular nonpublic school teachers meet to discuss the children's educational needs and progress, and BHHC personnel contact the private school administrators to secure the removal of any visible religious symbols or, occassionally, to discuss discipline problems.

Beginning in 1980, USDOE required BHHC to obtain from nonpublic school officials an assurance of suitable facilities and, in 1981, *written* assurances that the settings were religiously neutral. However, USDOE did not define for BHHC the term "religiously neutral." BHHC, in turn, did not define the term for the school principals.

The classrooms, while generally reserved for the exclusive *use* of the Title I teachers, are otherwise controlled by the

school. Some are rooms located within larger partitioned rooms and some are used by the school for purposes other than Title I activities when Title I classes are not being held. Many Title I rooms are identified by signs which identify them as Title I rooms, but the evidence does not indicate that these signs include notice that Title I is operated and controlled by USDOE and BHHC.

While many BHHC teachers have never seen a religious symbol inside a Title I classroom, religious symbols were found on some fifteen occasions mentioned in the evidence in the trial of this case. Most of the objects were promptly removed or covered, if nonremovable, upon their discovery. In one instance, however, removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Further, the evidence indicates that other incidents *may* have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the "school level." Finally, while the bypass teachers and supervisors are aware of religious symbols elsewhere in the buildings, none believe that their presence influences them or their instruction.

The Catholic elementary schools are subject to the jurisdiction, control, and authority of the Diocese, Archdiocese, and Parish in which they are located. The Lutheran elementary schools are subject to the control of their sponsoring congregations. These religious affiliated schools have two goals—one is to "teach the youngsters about God and faith in God," and the other is to "develop all of the academic programs, the secular subjects, as professionally as possible." Tr. XVIII at 42.

Catholic principals generally prefer to hire Catholic teachers. However, several employ persons of other faiths so long as the teacher agrees to contribute to both the religious and educational objectives of the school. Tr. XVIII at 157. Lutheran school administrators, with few exceptions, hire members of the Lutheran Church-Missouri Synod. Lutheran teachers

are "expected to present their lessons from a Christian viewpoint." *See, e.g., Eckhoff Deposition, March 15, 1982* at 106. Catholic school teachers are expected to avoid advocating positions contrary to the Church's teachings. One Archdiocesan handbook contains a specific prohibition against the use of Planned Parenthood materials and speakers.

Preference policies for admission, while they exist, have not resulted in the actual exclusion of non-affiliated students in either Catholic or Lutheran schools. Most of these schools have significant numbers of students who are non-Catholic or non-Lutheran.

There is no way of knowing whether the absence of Title I would result in a greater decline in enrollment than that already experienced by nonpublic schools, there being no specific evidence that parents select schools for their children where Title I is available. Because eligibility must be determined by the teacher, it appears that few parents would know at the time of application that their child is Title I eligible.

In most of the schools, thirty to forty-five minutes per day is spent on religious instruction. Religion classes in the Catholic schools, while it may include instruction about other denominations, "is geared toward the Catholic religion," and emphasizes Christian living, moral values and Bible studies. Tr. XVIII at 61. Lutheran schools similarly strive "to bring the child in touch with the Word of God" . . . "so that the Holy Spirit may work a stronger faith" and so that he may become a "Christian leader." *Plaintiff's Exhibit No. 1260. See also Eckhoff Deposition, March 15, 1982* at 18, 42. With few exceptions, students are required to study, but *not* to accept or to obey the doctrines of the sponsoring church. Teachers in secular classes are encouraged to promote Catholic or Christian values through "values discussions."

The schools regularly schedule religious service or activities, like prayer, during the day, and conduct religious holiday activities. Attendance at religious activities is mandatory in some schools, but not in others. The students are visited

regularly by members of the clergy and, in at least one Lutheran church, teachers ask students on Monday whether they attended church on Sunday. In summary, these religious affiliated schools are an "integral part of the religious mission of the sponsoring church."[8]

Legal Discussion

Plaintiffs make three challenges which may be disposed of at the outset of this discussion.

(1) First, plaintiffs argue that Title I is unconstitutional on its face. The Supreme Court has not held that Title I *requires*

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[8] Two quotes illustrate and reinforce this court's finding that the Catholic and Lutheran schools at issue are "an integral part of the religious mission of the sponsoring church" as well as a conduit for secular education. In "Human Rights," a publication of the Commission on Human Rights of Archdiocese of St. Louis in January, 1978, is an article, "Catholic Church and Its Schools," which states, in part:

> Catholic schools provide the Church an effective way of helping families form young people in value of the gospel. Fr. Andrew Greeley of the University of Chicago has demonstrated that the Catholic school is the most effective instruments for forming young people. In its task of explaining the gospel and helping the young experience it, the Catholic school provides students whose members openly profess their faith, and the peer influence of young people who share a belief in God. It offers time for prayer, the sacraments, and a daily religion class. . . . The Church in many ways, including through its schools, proclaims that the presence of God in all segments of a persons' life is the single most important value of all.

(Plaintiffs' Exhibit No. 1297). The Handbook of Trinity Lutheran School of St. Louis similiary explains:

> It is the responsibility of parents to teach the truths of God's Word to their children because the Bible commands parents to "bring up their children in the nurture and admonition of the Lord." God has also commanded the Church to "teach all nations to observe all things commanded by God." The Lutheran School exists mainly for the purpose of assisting both parents and the Church in meeting these responsibilities.

(Plaintiffs' Exhibit No. 943, p. 1).

on-premises instruction. *Wheeler* v. *Barrera*, 417 U.S. 402, 418, 94 S. Ct. 2274, 2284, 41 L. Ed. 2d 159 (1974). Government subsidized off-premises remedial instruction for nonpublic schools has been held constitutional in *Wolman* v. *Walters*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977). The court has reviewed the bypass amendment and finds that, on its face, it presents no further constitutional impediment to administration of the statute than was presented in *Wheeler*. In this court's opinion, Title I is facially valid because it may be administered within the confines of the Constitution. *See City Council of Los Angeles* v. *Taxpayers for Vincent*, ___ U.S. ___, 104 S. Ct. 2118, 2124, 80 L. Ed. 2d 772 (1984).

(2) Plaintiffs also challenge the Secretary's decision to invoke the bypass in Missouri. This court finds that the Secretary, in making his decision, acted rationally and within the scope of his authority. His decision was supported by a history of imbalanced Title I services for Missouri's nonpublic school students, by substantial evidence gathered by the USDOE investigating team and by a consideration of the relevant facts. *See Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981). Further, it was necessitated by Missouri law. *Mallory* v. *Barrera*, 544 S.W. 2d 556 (Mo. 1976) (en banc).

(3) Finally, plaintiffs attack the character of BHHC. While the religious affiliation of government employees, officers, or contractors in most circumstances is irrelevant and in no way offends the Constitution, *see, e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978), this court noted in this case that the use of a religious affiliated organization staffed exclusively at the inception of the program by people who were in one way or another affiliated with the Catholic Church, to implement a federally funded program in religiously affiliated schools, flew in the face of Congressional intent and violated the Establishment Clause. Congress intended to substitute a religiously *neutral* organization for SEA-LEA agencies whose operations were prohibited by local or state law. Implementation, management, and supervision of the program by a puppet of the Church, however well-intentioned, is

tantamount to direct fiscal government aid to religiously affiliated schools. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 9 L. Ed. 2d 745 (1971). However, plaintiffs' challenge to the original contract award was rendered moot by the expiration of the initial contract,[9] and, because BHHC was aware of its error long before the award of the second contract, it dramatically changed the composition of its staff and Board of Directors, transforming BHHC into what was ostensibly an entirely neutral organization.

Administration Of The On-Premise Program

The First Amendment to the Constitution of the United States provides in its first clause: "Congress shall make no law respecting an establishment of religion or prohibiting that free exercise thereof. . . ." This provision, the Establishment Clause, historically has served two purposes. It worked to prevent the federal government from establishing one church, and it prohibited aid or preferential treatment to a particular denomination. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. and Lee L. Rev. 347, 362-63 (1984). The Establishment Clause accounted for the concerns of a dominant federalism, reserving for the states the authority to deal with religious matters.[10] It "rested on the belief that a union of government and religion tends to destroy government and to degrade reli-

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[9] Thus, this court need not reach the issue of whether plaintiffs have standing to challenge the award to BHHC. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 100 (1982).

[10] The First Amendment, like the entire Bill of rights, initially served to limit only the federal government. In 1940, the Supreme Court incorporated the First Amendment into the Fourteenth Amendment and extended its application to the various states. *Everson* v. *Board of Education*, 330 U.S. 1, 13, 67 S. Ct. 504, 510, 91 L. Ed. 711 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 2d 1213 (1940).

gion." *Abington School District* v. *Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844, citing *Engel* v. *Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1963). A church unduly involved with government might be subverted to redirect its programs to meet ends chosen by government. The church would be compromised in its efforts to act in accordance with its higher calling. *Id.*

In extending Title I in a nondiscriminatory manner to religiously affiliated schools, courts recognize the parallel goals of Congress, individual states, and particular institutions to educate all students within the confines of the existing economic structure. The "State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 797, 93 S. Ct. 2955, 2978, 37 L. Ed. 2d 948 (1973). The parents of parochial school children, electing by reason of their convictions to send their children to these schools, nevertheless pay taxes for public education and, therefore, have historically sought some measure of public support to enhance the quality of education for their children or at least to make it comparable to that received by public school children. This is the case here where public funds have been appropriated to provide remedial instruction for the educationally deprived.

At least to the extent that such remedial instruction might be provided by public school teachers to parochial school children off the premises of the parochial schools, the Supreme Court has succumbed to these intertwined economic and educational goals, stating "Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman* v. *Walter*, 433 U.S. at 247, n.14. Accordingly, the Supreme Court, through its interpretations of what is constitutionally permissible, has sanctioned various forms of government aid to parochial

schools, aid which requires increasing allotments of tax money to parochial schools and which fosters increasing church school dependence on the federal government. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 797-98.

To maintain flexibility while preserving the cherished safeguard of the Establishment Clause, the Court has steered away from a "legalistic minuet in which precise rules and forms must govern." *Lemon* v. *Kurtzman* (and its companion *Earley* v. *DiCenso*), 403 U.S. 602, 614, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971). The line of separation between church and state is, according to the Court, necessarily maintained as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Id.* Aid to private church-affiliated colleges is upheld because these higher institutions are "less likely" to inculcate religious values than their "pervasively sectarian" elementary and secondary school counterparts. "This reduces the risk that government aid will in fact serve to support religious activities." *Tilton* v. *Richardson*, 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). Aid to elementary schools in the form of *off-premise* remedial instruction has been upheld because the entanglement is not "excessive," *Wolman* v. *Walter*, 433 U.S. 229 (1977), and aid in the form of textbooks is permissible because its "primary" effect is not to foster religion but to promote the secular education of all children, regardless of their religion. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). "That religion may indirectly benefit from governmental aid to the sectarian activities of churches does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman*, 403 U.S. at 664 (White, J., concurring).

At apparent odds with the blurred barriers or standards set by the Court is the Constitution's admonition that Congress shall make no law "respecting" the establishment of religion—that is, a law which could "lead" to the establishment of a state church or state religion or a law which the Supreme Court

considers to be "step" in that direction. *Lemon* v. *Kurtzman*, 403 U.S. at 612, 624.

The "danger" or "risk" that certain forms of governmental aid can be diverted to religious use in some cases is sufficient to preclude that aid. *See, e.g., Wolman* v. *Walter*, 433 U.S. at 250. With respect to other forms of governmental aid, such as remedial instruction, the "danger" creates a need for the government perpetually to monitor the aid to ensure its ultimate neutrality and to guarantee that the aid is not used to foster religion.[11] This necessity for surveillance in turn creates the "potential" or "possibility" of excessive entanglement. *Meek* v. *Pittenger*, 421 U.S. 349, 372, 95 S. Ct. 1753, 1766, 44 L. Ed. 2d 217 (1975). Even aid which creates a mere "diminished probability" of impermissible use does not pass constitutional muster. *Id.* at 370-71. Thus plaintiffs in actions such as this need demonstrate only an *unacceptable risk* of constitutional harm, not actual prejudice. With respect to subsidized teachers, "the State must be *certain*, given the Religion Clauses, that [they] do not inculcate religion." *Meek* v. *Pittenger*, 421 U.S. at 371, quoting *Earley* v. *DiCenso*, 403 U.S. at 619 (emphasis added).

In summary, the Supreme Court since 1971 has justified various forms of aid to religiously affiliated schools first, by

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[11] In *Felton*, the court noted that taxpayers interested in the preservation of the Establishment Clause "cannot reasonably be expected to mount perpetual guard." Further, the court stated, "In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. . . . [T]here could be no greater step away from the goal of *reasonable certainty* than to adopt a rule that the validity of a program should hinge on its precise workings from year to year." *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, ___ U.S. ___ (1984).

avoiding a ritualistic or literal quest for the advice of the Founding Fathers with its blurred barriers, and second, by determining that the challenged practices do not even tend to promote the type of interdependence between religion and state which the First amendment was designed to prevent.

The Court has advanced three tests for use in analyzing Establishment Clause challenges to statutes providing aid for parochial school children; all must be passed for the statute to survive the challenge. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advance nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon* v. *Kurtzman* (and its companion *Earley* v. *DiCenso*), 403 U.S. at 612-13.

A. Secular Legislative Purpose

The express purpose of Title I is to provide remedial education for all educationally deprived children meeting certain criteria of need, regardless of whether they attend a religiously affiliated school or a public one. Plaintiffs do not suggest that the enactment of Title I was motivated by an improper purpose. It serves a purely secular and nondiscriminatory legislative end unassociated with the Church's separate goal to advance religion. The statute on its face and as administered satisfies the first test.

B. Primary Effect

Regardless of the permissible nature of its purpose, in order for this court to hold that a statute providing aid to religiously affiliated schools, as administered, neither advances nor inhibits religion, the aid must be identifiable and separable from assistance to sectarian activities. *See Wolman* v. *Walter*, 433 U.S. at 250; *Committee for Public Education of Religious Liberty* v. *Nyquist*, 413 U.S. at 782. Additionally, the aid must primarily benefit the child or student rather than the sectarian institution. *Everson* v. *Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 2d 71 (1947). While it is undisputed that aid in

the form of textbooks, transportation, and certain diagnostic services ultimately results in financial support for the collective enterprise of sectarian institutions, the Court has determined that this support is a mere by-product of aid which primarily benefits the child. *Id.* In contrast, aid has a primary effect of advancing religion when it flows directly to pervasively sectarian institutions or when it funds a specifically religious activity in an otherwise secular setting. *Hunt* v. *McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 2874, 37 L. Ed. 2d 923 (1973). *See also Wolman* v. *Walter*, 433 U.S. at 251 (invalidating loan for instructional material and equipment because it "inescapably" had the improper primary effect of advancing the sectarian enterprise).

The present case involves remedial aid provided by teachers paid and supervised by a tax-supported nonreligious entity, BHHC, authorized by a statute which on its face provides that it shall not "be construed to authorize the making of any payment under this chapter for religious worship or instruction." 20 U.S.C. § 3384. In fact, there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction. The Supreme Court, in *Wolman*, upheld such aid *off-premises*, finding that the aid did not have a primary effect which advanced religion. 433 U.S. at 248. Implicit in this finding is the conclusion that the aid was identifiable and separable from assistance to sectarian activities, and that it primarily benefited the student.

In the present case, the instruction takes place *on-premises* in a room only sometimes identified as the "Title I room." Title I instruction supplements rather than supplants other instruction, thus maximizing the benefit to students who would otherwise receive no such instruction and minimizing the benefit to the school as a whole. Thus, defendants contend that the location of instruction does not alter the primary effect of Missouri's Title I program.

This court is prepared to accept the conclusion that in the administration of this program the nonpublic schools are not

relieved of any financial responsibility. However, this court recognizes that defendants conclusion—that the location does not alter the primary effect—is difficult to prove to a "certainty" because, while the evidence in this case was extensive the surveillance over the teachers was not. Sectarian ideologies, encouraged in a pervasively sectarian institution, may be introduced through subtle references. While the location does not diminish the benefit to children, it renders it more difficult to "identify and separate" the functions of Title I instruction or to ascertain whether the aid has a direct rather than incidental or an immediate rather than remote effect of advancing religion.

Substantial aid to the education of parochial school children necessarily results in some aid to the sectarian enterprise as a whole, *Wolman* v. *Walter*, 433 U.S. at 250, and a law found to have a legitimate "primary" effect to benefit children is not immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 789, n.39. This court concurs with *Nyquist*. "We do not think that such metaphysical judgments are either possible or necessary" under the circumstances of this case. 413 U.S. at 738, n.39. *See also Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F. 2d at 69-70.

C. Excessive Entanglement

To prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other," *Lemon* v. *Kurtzman*, 403 U.S. at 614, the Court devised a third standard which demands that the program avoid "an excessive government entanglement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414, 25 L. Ed. 2d 697 (1970). The test of "excessive entanglement" is "inescapably one of degree." *Id.*

To determine whether the statute or its administration fosters "excessive entanglement" between the church and the

government, the court must examine the character and purposes of the institutions that are benefited. *Lemon* v. *Kurtzman*, 403 U.S. at 615. If an institution is "pervasiavely sectarian." *Meek* v. *Pittenger*, 421 U.S. 349 (1975), or indistinguishable from one that is, *Wolman* v. *Walters*, 433 U.S. 229 (1977), the court must examine the nature of the aid that the State provides, the resulting relationship between the government and the religious authorities, and the potential for "political divisiveness" created by the program. *See Lemon* v. *Kurtzman*, 403 U.S. at 615.

To determine whether a school is pervasively sectarian and, therefore, subject to strict Establishment Clause limitations, the Supreme Court has adopted the following guidelines: (1) Is it *controlled* by a church or religious organization? (2) Is its *purpose* to teach, propogate, and promote a particular religious faith and to inculcate religious values? (3) Does it *conduct* its programs to fulfill that purpose? (4) Are there religious *restrictions* on admissions of students or on faculty appointments? (5) Does it *require instruction* on religious doctrine and impose religious restrictions on what the faculty may teach? (6) Does it *require attendance* at or participation in religious worship? (7) Is the school an *integral part* of the mission of the church? *Meek* v. *Pittenger*, 421 U.S. at 356.

This court encounters no difficulty in finding on the basis of the record made here that the religiously affiliated elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis. While all of the schools in question here do not possess all the characteristics found in *Meek*, they are essentially schools in which education is an integral part of the dominant sectarian mission of the church and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained. *Meek* v. *Pittenger*, 421 U.S. at 371. In determining whether the Establishment Clause is at issue, this court has not engaged in a school by school, year by year analysis. To ensure that *each* school each year was not

"pervasively sectarian" would require extensive revision of the existing structures and extensive government restrictions. Such surveillance would entail even greater entanglement than that found here and would obviously offend the Establishment Clause. In like manner, an analysis of the character of each school is not required by the Establishment Clause. *See Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 68.

Unlike *Tilton* v. *Richardson*, 403 U.S. 672 (1971), in which the aid was a "one-shot" allocation of funds for college buildings, the Title I program requires continuing allocations based on the number of children served and subject to inflation and escalating needs. The need for annual appropriations and the knowledge "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 797-98, led the Court, first in *Lemon*, to consider the "potential for political divisiveness" in its discussion of "excessive entanglement." 403 U.S. at 622-25. In *Nyquist*, the Court noted, "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored" 413 U.S. at 797-98. In *Meek*, the Court again discussed political divisiveness, holding that political fragmentation along religious lines, *together* with administrative entanglement necessary to insure services in church-related schools are strictly neutral and nonideological "compels the conclusion that [the state statute] violates the constitutional prohibition against laws 'respecting an establishment of religion,' " 421 U.S. at 372. Political divisiveness is evidenced in Missouri, not only through efforts to increase or decrease annual appropriations, but through a history of continuing litigation, through the persistent indignation of plaintiffs,, including Hugh Wamble of the Southern Baptist Convention, and through the disputes which occur between church factions, some of which would not agree to the removal of

church symbols in Title I rooms or the total relinquishment of control to a federally funded corporation.

In pervasively sectarian elementary and secondary schools, the risk of indoctrination or the process of inculcating religious doctrine is enhanced because the children are at an impressionable age.[12] *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 616. The correspondingly high risk of indoctrination requires this court to scrutinize closely the nature of the aid and the relationship between the government and the religious authorities.

In this case, the nature of the aid is on-premise remedial instruction by government subsidized teachers. Government subsidization of Title I instruction in Missouri is unlike any other form of government controlled aid because it directly involves teachers placed on the premises of the pervasively sectarian environment. First, teachers are peculiarly susceptible to influence by their environment. *Wolman* v. *Walter*, 433 U.S. at 247. Second, unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views. *Id.* Third, a teacher's handling of a subject is unpredictable. Because instruction, unlike the content of a textbook, inherently varies from teacher to teacher in content and emphasis, there is a great potential for involving in that content some aspect of faith or morals. *Lemon* v. *Kurtzman*, 403 U.S. at 617.

Because this is so, the task of this court is to ascertain whether, without excessive entanglement, the 'state [can] be certain, given the Religion Clause, that subsidized teachers do

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[12] Distinguishable are those cases where the Court has upheld aid to religiously affiliated colleges because college students are less impressionable, because religious indoctrination is not a substantial purppose or activity, because there is less likelihood that religion will permeate the secular advocation, and, therefore, because the schools are not pervasively sectarian for purposes of constitutional analysis. *Tilton* v. *Richardson*, 403 U.S. 672 (1972).

not inculcate religion" when placed on the premises of pervasively sectarian institutions, albeit in rooms largely devoid of religious symbols. *Meek* v. *Pittenger*, 421 U.S. at 370-71. Because it is required that the state be "certain," it cannot place reliance "on the subjective good faith and professionalism of sectarian teachers." *Id.* at 369. The fact that BHHC's Title I instructors in this case assert that environmental pressures do not influence their work and that religious views are not conveyed to the students is insufficient to diminish significantly the risk or danger of unconstitutional indoctrination. Thus, the state becomes obligated to perform a nearly impossible task, the task of reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution.

Meek and *Wolman* indicate that the supervision, while it is by government-paid authorities over government-paid and supervised teachers, is not significantly distinct from the continuing surveillance required over religiously controlled teachers, *unless* the facilities themelves are religiously neutral. *Wolman* v. *Walter*, 433 U.S. At 247; *Meek* v. *Pittenger*, 421 U.S. at 371-72. Influence on a therapist's behavior can be exerted either by the fact that he serves a sectarian administrator or the fact that he operates under the pervasive atmosphere of a religious institution. The danger arises from the nature of the institution, not the nature of the pupils. *Wolman* v. *Walter*, 433 U.S. At 247-48.

If these services are offered at truly *religiously neutral locations*, the danger perceived in *Meek* does not arise, and the corresponding entangling supervision by publicly paid state inspectors on parochial school property would be largely unnecessary. *Wolman* v. *Walter*, 433 U.S. at 247-48. "Supervision of public employees performing public functions *on public property* does not create any entanglement between church and state. *Id.* at 248 (emphasis added). Instruction conducted *on the premises* of pervasively sectarian institutions, on the other hand, while providing a practical response to the grow-

ing economic needs of parochial schools and the state, creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.[13]

The nature of the aid—continuing remedial instruction on-premises—necessarily contaminates the relationship between the religious authorities and the government's independent contractor.[14] On-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision. *See Wolman* v. *Walter*, 433 U.S. 229 (1977). "The prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and

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[13] Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. *See* pp. 15-16. Second, the court notes that such a holding reflects no more of an "absolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se" rules, obviously followed a similar analysis.

[14] The Court in *Wheeler* v. *Barrera*, 417 U.S. at 426 indicated that the Fourth Amendment implications may vary according to the precise contours of the plan that is formulated. It noted that a program whereby a former parochial school teacher is paid presents "quite different problems" from a program whereby a public school teacher, under public control, is sent into the parochial school. We agree that *different problems* are presented and note the wisdom of the Court's admonition that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*

state." *Meek* v. *Pittenger*, 521 U.S. at 370, citing *Lemon* v. *Kurtzman*, 403 U.S. at 619.

The *danger* perceived in *Meek* does not subside with the abandonment of religious artifacts. Religious neutrality cannot exist on the premise of a pervasively sectarian institution. The need for state monitoring in parochial schools is a continuing one. Even monitoring, however, cannot extinguish subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every student's hands, and by a teacher's own felt presence of the Church in the room.

The room belongs to the church and is in its ultimate control. Like the public school teachers described in *Felton*, BHHC's Title I instructors are

> so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same buildings, teach the same students, and confer with the teachers hired by the religious schools, many of the members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

Felton v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 67-68. It cannot be said that on-premise Title I rooms, like the off-premise sites in *Wolman*, are "neither physically nor educationally identified" with the nonpublic school. *See Wolman* v. *Walter*, 433 U.S. at 247.

To prevent teachers from indoctrinating children with values of the church, the government is not only required to maintain rooms free of religious symbols, it is required to monitor the instruction and to guard against visible religious authorities who by their presence at or near a Title I room may inadvertently pressure teachers to confrom. *See Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961, 94 S. Ct. 3163, 41 L. Ed. 2d 1154 (1974). The need for this constant on-premise monitoring or surveillance, described by some courts as "state inspectors prowling the halls of parochial schools and auditing classroom

instruction," *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 67, citing *Lemon* v. *Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.), added to the routine administrative contacts otherwise required to establish the program, to coordinate schedules, and to advise parochial school teachers of a student's progress, creates entanglement which far surpasses that necessitated by off-premise instruction.[15]

Religion demands a spiritual identification. The obvious covering of religious symbols and removal of religious artifacts do not diminish qualitatively the spirituality of an environment otherwise pervasively sectarian. And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered—the church has been compromised.

Analytically, a government that can provide on-premise remedial instruction in parochial schools may provide on-premise instruction in all secular subjects in those schools. *Accord Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 66-67. Because we recognize that the religiously affiliated school, as a *whole*, has a central purpose, the fostering of religion, and that the pieces comprise the whole, we recognize that state control over any substantial portion of those pieces undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education. Title I, on its face, does not require or suggest that its program be conducted on the premises of religiously affiliated schools.

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[15] *Meek* rested on the conclusion not that instruction of pervasively sectarian premises actually "fostered" religion, but rather that it required *monitoring* violative of the entanglement test. *Wolman* affirmed *Meek's* prohibition of services, stating that the "danger arose [in *Meek*] from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman* v. *Walters*, 433 U.S. at 247.

See Wheeler v. *Barrera*, 417 U.S. at 419. On its face, Title I does not violate the Establishment Clause.

The momentum developed in this area of the law may continue only if sanctioned by further Supreme Court opinions. The risk early envisioned by the Court is increased by the "difficulty of perceiving in advance exactly where the 'verge' of the precipice lies." *Lemon* v. *Kurtzman*, 403 U.S. at 624. We concur with the Second Circuit in *Felton*. *Wolman* suggests constitutionally permissible alternatives—all off-premises at religiously neutral sites. Current law does not permit the extension of tax-supported remedial instruction into parochial schools. The precipice lies here.

Epilogue

There is a danger that this decision may be misconstrued by large segments of our society, both those who will agree with it and those who will condemn it. Some may say, because of the strength of their varying convictions, that this result is "anti-religious" in general or "anti-Catholic" in particular. The court mentions this only because there has been intertwined in the filings, court presentations, and in the prior ardent lobbying efforts of the *pro se* plaintiff in particular, some suggestion that his is a crusade against a diabolical heirarchy [sic] which is set upon destroying free religion in America. The court expressly disavows any such view.

In reaching the result here announced, this court wants it made absolutely clear that it tolerates no part of the thinking of the "Know Nothings" of the mid-19th Century, or the polemics of Paul Blanshard in the 1930's and 40's or the 1960 opposition to John F. Kennedy because of his Catholicism. If the plaintiffs draw comfort for any such point of view out of this decision, it is only by the sheerest and most accidental coincidence of their views and the dictates of First Amendment law as it has been previously announced by the Supreme Court.

This court is not insensitive to the emotionally unpopular termination of a program of aid to educationally deprived chil-

dren which may *but need not necessarily* follow this decision. Educational assistance to children who through no fault of their own have been deprived in their early lives and whose futures may be bleak without the kind of remedial education envisioned by this statute is entirely consistent with the long-held American goal of equal access to education for all. Be that as it may, this result is one that is dictated by the necessity of preserving one of the cherished freedoms guaranteed by our Constitution. We concur with Judge Friendly. Such freedoms were hard won and they are protected only by hard decisions.

Accordingly, it is

ORDERED that defendants' Motion to Stay Disposition of this case is denied. It is further.

ORDERED that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in that manner, is therefore, permanently enjoined. It is further

ORDERED that this injunction be stayed pending disposition by the Supreme Court of *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, ____ U.S. ____ (1984).

/s/Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

November 28, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Docket Number 77-0254-CV-W-8

Honorable Joseph E. Stevens, Jr.

G. HUGH WAMBLE, ET AL.

v.

TERREL H. BELL, Secretary of the
U.S. Department of Education, ET AL.

[Filed December 3, 1984]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in

that manner is hereby permanently enjoined. It is further

Ordered that this injunction be stayed pending disposition by the Supreme Court of *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, *cert. granted*, ——, U.S. —— (1984).

Date—December 3, 1984

R. F. CONNOR
Clerk

By /s/ [Illegible]
Deputy Clerk

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

2. The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et. seq.*, provides in pertinent part:

20 U.S.C. 2701 Declaration of policy:

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to help meet the special educational needs of such children.

20 U.S.C. 2736:

(c) Federal funds to supplement, not supplant regular non-Federal funds

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

20 U.S.C. 2740:

(a) General requirements:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and meeting the requirements of sections 2732 and 2733 of this title, and subsections (a), (b), (d), and (m) of section 2734 of this title, and subsection (c) of section 2736 of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall

be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) By-pass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirement, and shall arrange for the provisions of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appro-

priate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the

record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

20 U.S.C. 2836(a):

Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 2762 or 2802 of this title, the Secretary shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall reduce or terminate further payments under this subchapter to specified local educational agencies

or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under this subchapter, or (2) payments by the State educational agency under this subchapter shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies or State agencies shall be reduced, as the case may be. Where partial payments to a local educational agency are continued under this subsection, the expenditure of the payments shall be subject to such conditions as the Secretary deems appropriate in light of the failure which led to the partial withholding. In the case of a substantial and continuing violation, the Secretary may suspend payments to such agency, after such agency has been given reasonable notice and opportunity to show cause why such action should not be taken.

3. Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provides in pertinent part:

20 U.S.C. 3801:

The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], but to do so in a manner which will

eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C. 3802:

During the period beginning October 1, 1982, and ending September 30, 1987, the Secretary shall, in accordance with the provisions of this chapter, make payments to State educational agencies for grants made on the basis of entitlements created under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] and calculated in accordance with provisions of that title in effect on September 30, 1982.

20 U.S.C. 3803:

(a) Program eligibility

Except as otherwise provided in this chapter, the Secretary shall make payments based upon the amount of, and eligibility for, grants as de-

termined under the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] in effect on September 30, 1982:

(1) Part A—"Programs Operated by Local Education Agencies" [20 U.S.C. 2711 et seq.]:

(A) Subpart 1—"Basic Grants" [20 U.S.C. 2711 et seq.] and

(B) Subpart 2—"Special Grants" [20 U.S.C. 2721 set seq.].

(2) Part B—"Programs Operated by State Agencies" [20 U.S.C. 2761 et seq.]:

(A) Subpart 1—"Programs for Migratory Children" [20 U.S.C. 2761 et seq.];

(B) Subpart 2—"Programs for Handicapped Children" [20 U.S.C. 2771 et seq.];

(C) Subpart 3—"Programs for Neglected and Delinquent Children" [20 U.S.C. 2781 et seq.]; and

(D) Subpart 4—"General Provisions for State Operated Programs" [20 U.S.C. 2791 et seq.].

(b) Administrative provisions

The Secretary, in making the payments and determinations specified in subsection (a) of this section, shall continue to use the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect on September 30, 1982:

(1) Part E—"Payments" [20 U.S.C. 2841 et seq.]:

(A) Section 191—"Payment Methods" [20 U.S.C. 2841];

(B) Section 192—"Amount of Payments to Local Educational Agencies" [20 U.S.C. 2842];

(C) Section 193—"Adjustments Where Necessitated by Appropriations" [20 U.S.C. 2843]; and

(D) Section 194—"Payments for State Administration" [20 U.S.C. 2844], subject to subsection (d) of this section.

(2) Part F—"General Provisions" [20 U.S.C. 2851 et seq.]:

(A) Section 197—"Limitation on Grants to Puerto Rico" [20 U.S.C. 2853]; and

(B) Section 198—"Definitions" [20 U.S.C. 2854] and conforming amendments to other Acts, except that only those definitions applicable to this chapter shall be used.

(c) Applicability rule

The provisions of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] which are not specifically made applicable by this subchapter shall not be applicable to programs authorized under this subchapter.

20 U.S.C. 3804:

(a) General

Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of

equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.

(b) Program design

State Agency programs shall be designed to serve those categories of children counted for eligibility for grants under section 3803(a)(2) of this title in accordance with the requirements of this subchapter.

(c) Program description

A local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b)(2) of this title, and which are included in an application for assistance approved by the State educational agency. Such programs and projects may include the acquisition of equipment and instructional materials, employment of special instructional and counseling and guidance personnel, employment and training of teacher aides, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, the construction, where necessary, of school facilities, other expenditures authorized under title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect September 30, 1982, and planning for such programs and projects.

(d) Records and information

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this subchapter).

20 U.S.C. 3805:

(a) Application by local educational agency

A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

(b) Application assurances

The application described in subsection (a) of this section shall be approved if it provides assurances satisfactory to the State educational agency that the local educational agency will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the State agency under this subchapter), and that the programs and projects described—

(1) (A) are conducted in attendance areas of such agency having the highest concentrations of low-income children;

(B) are located in all attendance areas of an agency which has a uniformly high concentration of such children; or

(C) are designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency;

(2) are based upon an annual assessment of educational needs which identifies educationally deprived children in all eligible attendance areas, permits selection of those children who have the greatest need for special assistance, and determines the needs of participating children with sufficient specificity to ensure concentration on those needs;

(3) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served and are designed and implemented in consultation with parents and teachers of such children;

(4) will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year; and

(5) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 3806 of this title.

20 U.S.C. 3806:

(a) General requirements

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections 3804(c), 3805(b)(2), (3), and (4), and 3807 (b) of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to

provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provisions of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative costs of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the

State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secre-

tary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Existing bypass provision

Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] prior to August 13, 1981, shall remain in effect to the extent consistent with the purposes of this subchapter.

20 U.S.C. 3807(b):

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency shall not be required to provide services under this subchapter outside the regular classroom or school program.

20 U.S.C. 3872:

(a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chap-

ter the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this chapter; or affected subchapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further payments under the chapter or affected subchapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the chapter or affected subchapter thereof, or (2) payments by the State educational agency under the chapter or affected subchapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

Upon submission to a State of a notice under subsection (1) of this section that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

4. 34 C.F.R. Part 200 (1983), provides in relevant part:

SUBPART E—PARTICIPATION IN CHAPTER 1 PROGRAMS OF EDUCATIONALLY DEPRIVED CHILDREN IN PRIVATE SCHOOLS

§ 200.70 Responsibility of LEAs.

(a) (1) In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the

LEA who are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(2) If the LEA decides to serve educationally deprived, low-income children under Section 556 (b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(b) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(c) The LEA shall exercise administrative direction and control over Chapter 1 funds and property that benefit educationally deprived children in private schools.

(d)(1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.

(2) This employment or contract must be under the control and supervision of the public agency.

(e) In its application for Chapter 1 funds, the LEA shall make provision for services to educationally deprived children attending private elementary and secondary schools.

(Sec. 555, 20 U.S.C. 3804; Sec. 556(b)(5), 20 U.S.C. 3805(b)(5); Sec. 557(a), 20 U.S.C. 3871(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.71 Factors used in determining equitable participation.

(a) *Equal expenditures.* Expenditures for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the LEA.

(b) *Services on an equitable basis.* The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 556(b)(3), 20 U.S.C. 3805(b)(3))

§ 200.72 Funds not to benefit a private school.

(a) An LEA shall use Chapter 1 funds to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use Chapter 1 funds to meet the special educational needs of children in private schools, but not for—

(1) The needs of the private schools; or

(2) The general needs of the children in the private schools.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.73 Use of public school employees.

An LEA may use Chapter 1 funds to make public employees available in other than public facilities.

(a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

(b) If those services are not normally provided by the private school.

(Sec. 557(a), 20 U.SC. 3806(a))

§ 200.74 Equipment and supplies.

(a) To meet the requirements of Section 557 (a) of Chapter 1, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with Chapter 1 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.75 Construction.

No Chapter 1 funds may be used for repairs, minor remodeling, or construction of private school facilities.

(Sec. 557(a), 20 U.S.C. 3806(a))

SUBPART F—DUE PROCESS PROCEDURES PROCEDURES FOR BYPASS

§ 200.80 Bypass—General.

(a) The Secretary implements a bypass if an LEA—

(1) Is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) Has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools.

(b) If the Secretary implements a bypass, the Secretary waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Chapter 1 services for private school children under a bypass. The Secre-

tary deducts the cost of these services, including any administrative costs, from the appropriate allocations of Chapter 1 funds provided to the affected LEA and SEA. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(Sec. 557(b), 20 U.S.C. 3806(b))

§ 200.81 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected LEA and SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the LEA and SEA to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the LEA and SEA that they have at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and may request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the LEA and SEA by certified mail with return receipt requested.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.82 Bypass procedures.

Sections 200.83-200.85 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified

by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A)).

§ 200.83 Appointment and functions of a hearing officer.

(a) If an LEA or SEA requests a show cause hearing, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery, or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the LEA, SEA, and representatives of the private school children of the time and place of the hearing.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.84 Hearing procedures.

(a) At the hearing, a transcript is taken. The LEA, SEA, and representatives of the private school children each may be represented by legal counsel, and each may submit oral or written evidence and arguments at the hearing.

(b) Within ten days after the hearing, the hearing officer indicates that a decision will be issued on the basis of the existing record, or requests further information from the LEA, SEA, representatives of the private school children, or Department of Education officials.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.85 Post hearing procedures.

(a) Within 120 days after the hearing record is closed, the hearing officer issues a written decision on whether the proposed bypass should be implemented. The hearing officer sends copies of the decision to the LEA, SEA, representatives of the private school children, and the Secretary.

(b) The LEA, SEA, and representatives of the private school children each may submit written comments on the decision to the Secretary within 30 days from the receipt of the hearing officer's decision.

(c) The Secretary may adopt, reverse, or modify the hearing officer's decision.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))